BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF AIR QUALITY COALITION, et al., Appellants,	)	PCHB No. 997
v.	)	ORDER
PUGET SOUND AIR POLLUTION CONTROL AGENCY and ASARCO, Inc., Respondents,	)	
U. S. ENVIRONMENTAL PROTECTION AGENCY, *Amicus Curiae.*	)	

Motions for Partial Summary Judgment by both respondent ASARCO, Inc. and appellants were brought before the Pollution Control Hearings Board, W. A. Gissberg, Chris Smith, and Art Brown on March 14, 1977 in Lacey, Washington.

Appellants were represented by their attorney, Michael E. Nelson; respondent ASARCO, Inc. (ASARCO) was represented by its attorneys,

C. John Newlands and Robert F. Baker; respondent Puget Sound Air Pollution Control Agency Board of Directors (PSAPCA) was represented by its attorney, Keith D. McGoffin; U. S. Environmental Protection Agency, *Amicus Curiae*, did not participate. Hearing examiner David Akana presided.

Having considered the motions, the affidavits, the record of PSAPCA, the records and files herein, and arguments of counsel, and finding that there is no genuine issue as to any material fact, the Board makes the following decision:

THE ISSUE

Both respondent ASARCO and appellants seek a judgment with respect to appellants' issue brought under the State Environmental Policy Act, chapter 43.21C RCW (hereinafter "SEPA") that

> The PSAPCA Board acted contrary to public policy and law and in abuse of discretion by simultaneously granting ASARCO a five-year variance while at the same time finding the procedural and substantive requirements of SEPA must be complied with.

The essence of appellants' issue is that it is unlawful for PSAPCA to grant ASARCO a five-year variance under RCW 70.94.181 without properly complying with SEPA.

ASARCO'S MOTION

ASARCO seeks judgment in its favor as to the foregoing issue and raises several legal arguments in support of its motion.

1. CONFLICT

ASARCO contends that a conflict exists between the Washington State Clean Air Act (ch. 70.94 RCW) and the State Environmental Policy Act (ch. 43.21C RCW) with respect to the variance provision under RCW 70.94.181.

SEPA provides:

> The legislature authorizes and directs that, to the fullest extent possible . . . (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:
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> . . .
>
> (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official . . . . (Emphasis added).

RCW 43.21C.030 (Washington Laws, 1971 Ex. Sess., ch. 109, § 3). The foregoing section is said to conflict with RCW 70.94.181(7) which was added in 1974 and either repeals RCW 43.21C.030 by implication or exempts variance actions from the Environmental Impact Statement (EIS) requirements of SEPA as a matter of law. RCW 70.94.181(7) provides that

> An application for a variance, or for the renewal thereof, submitted to the department of ecology or board[1] pursuant to this section shall be approved or disapproved by the department or board within sixty-five days of receipt unless the applicant and the department of ecology or board agree to a continuance. (Emphasis added).

(Washington Laws, 1974 1st Ex. Sess., ch. 59, § 1)

Repeal by Implication

The rule regarding repeal by implication is set forth in Stephens v. Stephens, 85 Wn.2d 290, 295 (1975):

> Statutes are impliedly repealed by later acts only if "(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent

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1. The term "board" means the board of directors of an air pollution control agency with jurisdiction in the county. RCW 70.94.030(4 and 5).

with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction." (Citation omitted.)

Jenkins v. State, 85 Wn.2d 883 (1975). Repeals by implication are not favored. Id. We cannot conclude that the 1974 amendment to RCW 70.94.181 amended chapter 43.21C RCW by implication within the above-stated rule.

Exemption

ASARCO argues that because a variance must be approved or disapproved within sixty-five days of receipt, and an EIS cannot be prepared in such time period, that therefore, under the reasoning of Flint Ridge v. Scenic Rivers Association, 8 ERC 2137 (1976),[2] variance proceedings are exempt from the detailed statement requirements of RCW 43.21C.030. We take as fact the uncontroverted affidavits that the time required for proceedings leading to a final EIS would take a minimum of five months. In the Flint Ridge case, the issue was whether the National Environmental Policy Act of 1969 (NEPA) required the Department of Housing and Urban Development (HUD) to prepare an EIS before it could allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act (Disclosure Act) to become effective. At the outset, it is noted that we are not construing a land sales disclosure act (82 Stat. 590 as amended--compare ch. 58.19 RCW) but rather the Washington State Clean Air Act

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2. When necessary, federal cases are examined to construe and apply SEPA. Eastlake Com. Coun. v. Roanoke Assoc., 82 Wn.2d 475, 488, n.5 (1973).

(ch. 70.94 RCW). The Disclosure Act is designed, not for environmental purposes, but to prevent false and deceptive practices in the sale of unimproved tracts of land. 8 ERC at 2137. The primary purpose of the Washington State Clean Air Act is to secure and maintain beneficial levels of air quality. RCW 70.94.011. Accordingly, under ch. 70.94 RCW, PSAPCA is equipped to deal with environmental issues (air quality issues) while HUD is not. In addition to the very different purposes sought by each Act, there are other distinguishing factors which cause us to conclude that the reasoning of the Flint Ridge case is not applicable to the matter now before us: (1) There is no discretion under the federal Disclosure Act, while RCW 70.94.181 provides that a variance is discretionary; (2) There are no findings or evaluation of a statement made under the federal Disclosure Act, while ch. 70.94 RCW provides for variance proceedings which are quasi-judicial[3] in nature complete with the taking of evidence, and the making of findings; (3) Under the federal Disclosure Act, a statement becomes effective automatically after 30 days unless suspended for a defect apparent on the face of the statement, while under RCW 70.94.181 a variance is not effective automatically after 65 days, but rather, PSAPCA can tailor an appropriate variance or deny the application.

Under Flint Ridge, the Court found an irreconcilable and fundamental conflict with the preparation of an EIS and the statutory duties under the Disclosure Act because HUD had no discretion thereunder

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3. K. Davis, Administrative Law Treatise, Section 7.02, p. 413 (1958) is illustrative. See Floyd v. Dept. Labor & Ind., 44 Wn.2d 560 (1954); Francisco v. Bd. of Directors, 85 Wn.2d 575 (1975).

and the existence of such power would contravene the purpose of the 30-day provision.

> In sum, even if the Secretary's action in this case constituted major federal action significantly affecting the quality of the human environment so that an environmental impact statement would ordinarily be required, there would be a clear and fundamental conflict of statutory duty. The Secretary cannot comply with her duty to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments. In these circumstances, we find that NEPA's impact statement requirement is inapplicable. 8 ERC at 2142.

There is no similar conflict with the preparation of an EIS under SEPA and PSAPCA's duties under the Clean Air Act. Complying with SEPA "to the fullest extent possible" (RCW 43.21C.030) does not conflict with the purpose of the Clean Air Act, i.e., to secure and maintain beneficial levels of air quality (RCW 70.94.011). In a real sense, SEPA supplements the Clean Air Act. RCW 43.21C.060. Leschi v. Highway Comm'n, 84 Wn.2d 271, 275 (1974); Eastlake Com. Coun. v. Roanoke Assoc., 82 Wn.2d 475, 492 (1973). Moreover, SEPA itself would disfavor the finding of such a conflict.

> The right . . . to a "healthful environment" is expressly recognized as a "fundamental and inalienable" right by the language of SEPA.[4] The choice of this language in SEPA indicates in the strongest possible terms the basic importance of environmental concerns to the people of this state. It is a far stronger policy statement than that found in the National Environmental Policy Act which reads only that "The Congress recognizes that each person should enjoy a healthful environment . . ." 42 U.S.C. § 4331(c).

Leschi v. Highway Comm'n, supra at 280. SEPA also provides that

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4. RCW 43.21C.020.

> . . . all branches of government . . . shall:
> (c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official . . . . (Emphasis added). RCW 43.21C.030(2).

If the proposal is a major action significantly affecting the quality of the environment, "all branches of government shall" prepare an EIS. In view of the strong legislative policy and purposes of SEPA, the word "shall" in RCW 43.21C.030(2) is mandatory rather than directory. Spokane v. Spokane Police Guild, 87 Wn.2d 457, 465 (1976). A variance under RCW 70.94.181 and Section 7.01 of respondent's Regulation 1 is a permission to engage in activity contrary to what is otherwise the usual rule. A variance is not a right but is granted at the discretion of PSAPCA. RCW 70.94.181(5). Even if a decision to approve or disapprove an application "shall" be made within 65 days, the legislature apparently recognized that some matters may be more complex and require more time to determine, and provided for a continuance beyond the 65-day limit. RCW 70.94.181(7). In view of such provision, the word "shall" in RCW 70.94.181(7) is directory rather than mandatory. Spokane v. Spokane Police Guild, supra. Accordingly, we cannot find a conflict between the provisions of SEPA and RCW 70.94.181(7) which can be said to be a "clear and fundamental conflict of statutory duty."

Even assuming the reasoning of Flint Ridge did apply, if application was for a renewal of a variance, in a proper case, PSAPCA may have to anticipate such application:

> Given the thoroughness of the environmental evaluation required under SEPA and the anticipated third renewal shortly forthcoming, the building department should have begun their review at SEPA's effective date or at such a time after SEPA's effective date that they could anticipate an application for a permit renewal would be made. The actual application cannot serve as the triggering mechanism to the building department's duty to prepare an environmental impact statement for that would create the paradoxical situation of having the operation of SEPA placed within the discretion of the developer, a result inconsistent with the act. The act speaks to the governmental entities and it is their duty to begin environmental evaluations when required by the act, independent of requests by the public or because of the developer's behavior. (Emphasis added).

Eastlake Com. Coun. v. Roanoke Assoc., 82 Wn.2d 475, 495 (1973). The exemption claimed in Flint Ridge cannot apply as a matter of law as broadly as ASARCO contends.

Before leaving the Flint Ridge exemption, we note that the legislature created the Council on Environmental Policy (CEP)[5] to adopt "rules of interpretation and implementation" of SEPA. RCW 43.21C.110. Accordingly, CEP promulgated guidelines, ch. 197-10 WAC, effective January 16, 1976, which. although not directly applicable to the present matter, can be used to "interpret" SEPA. See No Oil v. Los Angeles, 7 ERC 1257, n.2. (S.Ct., Cal., 1974). The SEPA guidelines exempt variances under the Washington State Clean Air Act which are for one year or less. WAC 197-10-170(13). The converse must follow: a variance for more than one year is not exempted by the CEP guidelines from the provisions of SEPA. Thus, using the SEPA guidelines to

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5. The Council on Environmental Policy was abolished on June 30, 1976 and its powers, duties and functions were transferred to the Department of Ecology. RCW 43.21C.100.

interpret SEPA, we conclude that variances under the Washington State Clean Air Act, which exceed one year in duration as does the present ASARCO variance, are not exempt from the EIS requirement.[6] The apparent solution to the posed dilemma said to be caused by SEPA is found in the SEPA guidelines. If it appears that an EIS is required, a variance could be granted for one year or less to allow the preparation of such document without violating any provision of SEPA. WAC 197-10-170(13). However, a one year variance must, in addition, meet the test of RCW 70.94.181.

Only the legislature or the Department of Ecology (as successor to CEP) can properly exempt variances from compliance with SEPA. The questions of public health and the plain language of SEPA and court interpretations thereof are too demanding for us to put aside compliance in the name of equity, economics, or expediency.

2. FUNCTIONAL EQUIVALENCY

ASARCO contends that PSAPCA need not prepare an EIS in its administration of the Washington State Clean Air Act because the procedures used, particularly the variance criteria in RCW 70.94.181, are the "functional equivalent" of an EIS. In support of its position, ASARCO cites Wyoming v. Hathaway, 8 ERC 1416 (1975), Amoco Oil v. EPA, 6 ERC 1481 (1974), and Duquesne Light v. EPA, 5 ERC 1473 (1973). These cases all involved EPA, an agency which has a broader environmental mission and responsibility than does PSAPCA. See Wyoming v. Hathaway, supra at 8 ERC 1420-21. Compare ch. 70.94 RCW. PSAPCA does not have

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6. See WAC 197-10-170.

subject matter jurisdiction over water or land, but only air. Ch. 70.94 RCW. Thus, equating the two agencies is not warranted.

The functional equivalency doctrine has not been adopted in the state of Washington.[7] Although the federal cases cited are authoritative for quasi-legislative acts even more compelling are the terms of SEPA which do not provide for a functional equivalent of an EIS. SEPA mandates that "all branches of government . . . shall" prepare a statement. RCW 43.21C.030. There is no exception or indication that any exception thereto was contemplated. Moreover, the SEPA guidelines, whose purpose is to interpret and implement SEPA do not provide for a "functional equivalent" of an EIS.

The foregoing interpretation of SEPA is also consistent with the purpose of the EIS process, i.e., "to provide environmental information to governmental decision makers to be considered prior to making their decision." WAC 197-10-055(1). See WAC 197-10-055(2). The process allows full disclosure to other agencies and the public, and provides them full opportunity to comment before the decision is made.

RCW 70.94.181 as administered by PSAPCA does not fulfill the requirements of RCW 43.21C.030 which, together with the conspicuous absence of provision for a functional equivalent of an EIS in SEPA

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7. Cf. Norway Hill v. King County Council, 87 Wn.2d 267, 279 (1976). Even though the Council had extensively considered a matter and issued its approval only after the imposition of conditions designed to protect the environment an EIS was nonetheless required. In Assoc. Gen. Contractors v. Dept. of Ecology, PCHB 658 (1975), this Board required the state environmental agency to comply with SEPA. The Court, in Stempel v. Dept. of Water Resources, 82 Wn.2d 109, required the predecessor agency of the Department of Ecology to comply with SEPA.

and its interpretive guidelines, requires us to conclude that our creation of a functional equivalent of an EIS would not be proper.

3. STATUS QUO EXEMPTION

ASARCO contends that a variance simply constitutes a delay in the strict enforcement of clean air regulations and that such an action preserving the status quo is not subject to the EIS requirements of SEPA. We disagree. The goals of SEPA are not only to prevent or mitigate damage to the quality of the environment, but also: "to promote efforts which will prevent or eliminate damage to the environment and biosphere;[8] . . . The legislature, . . . recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man . . . ;[9] The legislature recognizes that each person has a fundamental inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[10] See Eastlake Com. Coun. v. Roanoke Assoc., supra at 490.

ASARCO cites Platte Area Reclamation Committee v. Brinegar, 7 ERC 1285 (1974) and Borough of Fairfield v. Coleman, 8 ERC 1518 (1975) in support of its status quo exemption argument. The Court in Platte held that the commitment of money by the federal government to merely replace a bridge and restore a connecting street at the request of a local official was "neither a major federal action nor one which

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8. RCW 43.21C.010.

9. RCW 43.21C.020(1).

10. RCW 43.21C.020(3).

significantly affects the quality of the human environment." 7 ERC at 1287. Similarly, in Borough of Fairfield, the Court held that the federal government's partial funding of an existing, operating airport did not require an EIS as a matter of law because there was no federal action. 8 ERC at 1521. In both cases the Court found no major federal action. In the present matter, the granting of a variance, a discretionary act, is an "action." See WAC 197-10-040(2). Eastlake Com. Coun. v. Roanoke Assoc., supra at 490; Loveless v. Yantis, supra at 764-65. As hereafter discussed, the action was also "major." Platte and Borough of Fairfield are also not authority for the exemption of EIS preparation where it is otherwise required. The fact that a status quo will result, e.g., one bridge for a duplicate bridge, does not aid ASARCO's case. It has no right to a status quo; rather, it must comply with the rules of Regulation 1. The fact that it cannot now comply with the rules requires it to seek a variance. It does not seek a status quo in the sense of meeting or exceeding the applicable rules, but rather, a status quo of remaining in violation of the applicable rules for up to five years.

CONCLUSION

Having considered ASARCO's motion and each contention, we conclude that ASARCO's motion should be denied.

APPELLANTS' MOTION

In order to grant appellants' motion, it must be determined that as a matter of law, SEPA was not complied with. Drawn into issue are PSAPCA's "negative threshold determination" regarding the five-year variance and whether, based on the entire record, and as a matter of law,

an EIS should have been prepared.

Negative Threshold Determination

We conclude that PSAPCA's decision to grant a variance impliedly, if not expressly through Resolution No. 359, incorporated a "negative threshold determination."

> Similarly, under SEPA an agency's decision to approve a project impliedly, if not expressly, determines that the project is consistent with the citizen's fundamental right to a healthful environment and with the legislatively mandated policy that an agency action allow to citizens the widest practicable range of beneficial uses of the environment without degradation. RCW 43.21C.020(2)(c). These agency conclusions, either express or implied, are questions of law . . . .

Leschi v. Highway Comm'n, supra at 285.

Standard of Review for "Negative Threshold Determinations"

The standard of review of "negative threshold determination" under SEPA is the "clearly erroneous" standard as set out in RCW 34.04.130(6)(e). Norway Hill v. King County Council, 87 Wn.2d 267, 275 (1976). The Pollution Control Hearings Board makes no factual determination under this standard but applies a legal test of the agency's factual determinations using the clearly erroneous standard as applied to the record developed. See Leschi v. Highway Comm'n, supra at 285. The board can reverse the decision of an administrative agency "if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inference, conclusion, or decisions are: . . . (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order." RCW 34.04.130(6). See Merkel v. Port of Brownsville, 8 Wn.App. 844, 848 (1973).

Major Action

The issuance of a variance of up to five years in duration is a "major action" because it involves a "discretionary nonduplicative" decision. Eastlake Com. Coun. v. Roanoke Assoc., supra at 490.

> In Eastlake, at pages 490-92, we set forth the elements necessary to establish a "major action." We therein indicated that if the governmental action "involved a discretionary nonduplicative stage" of the government's approval, SEPA would apply where the considered project significantly affects the environment. The preliminary approval of the plat is a discretionary act not mandatory under the Thurston County ordinance, since this governmental action could have resulted in a denial of the plat.
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> Where choice exists there is discretion and the fact that previous to SEPA the choice could be solely based on narrow or limited evaluative points set forth in an ordinance or statute is immaterial. "It is no answer to this finding of discretion in the renewal process that the department is bound and limited in its considerations to the permit renewal provisions of the Seattle code. Such a claim was raised and rejected in Stempel . . ." 82 Wn.2d at 492.

Loveless v. Yantis, 82 Wn.2d 754, 764 (1973). The granting of the subject variance is a discretionary, nonduplicative act not mandated under RCW 70.94.181, and is therefore a "major action." Moreover, the CEP guidelines are helpful.

The interpretive SEPA guidelines define major action as follows:

> Major action means any "action" . . . which is not exempted by WAC 197-10-170, -175 and -180.

WAC 197-10-040(24). A variance lasting up to five years is not exempted by the quoted sections. To the contrary, WAC 197-10-170(13) provides:

> Variances under Clean Air Act. The granting of variances pursuant to RCW 70.94.181 extending applicable air pollution control requirements for one year or less shall be exempt.

Thus, a variance for more than one year is not exempt and hence is a

"major action."

Significantly Affecting

A project will significantly affect the environment "whenever more than a moderate effect on the quality of the environment is a reasonable probability." Norway Hill v. King County Council, supra at 278. Swift v. Island County, 87 Wn.2d 348, 358 (1976).

The CEP guidelines at WAC 197-10-360(3) are also helpful in determining whether a proposal will have a "significant adverse" effect:

> . . . The question at the threshold determination level [a declaration of non-significance or significance] is not whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather if the proposal involves any significant adverse impacts upon the quality of the environment. If it does, an EIS is required. No test of balance shall be applied at the threshold determination level. (Emphasis added).

ASARCO's Tacoma plant, the subject of the variance is a custom smelter of arsenic-laden copper ores imported principally from the Philippine Islands and Peru. The plant produces arsenic trioxide as a by-product, and is the only such producer in the United States. The annual production of arsenic trioxide at the Tacoma plant is about 11,000 tons. Annual atmospheric emissions from the Tacoma smelter are 238 tons of arsenic trioxide, 1,286 tons of total particulate, and 89,000 tons of sulfur dioxide (in 1975) (Exhibit 1). These emissions to the ambient air pose possible adverse effects of unknown dimensions over a large geographic area which affect air, land and water. Transcript, January 27, 1976. The variance granted would allow the emissions to continue above and in excess of that allowed by regulation for up to

five years. We believe that there is a reasonable probability, on its face, that the variance granted would have more than a moderate effect on the quality of the environment.

Conclusion

We conclude that the "negative threshold determination" made by PSAPCA regarding the five-year variance was erroneous. The granting of the five-year variance was a major action which will have a significant adverse impact on the quality of the environment, and therefore we are left with the definite and firm conviction that a mistake has been committed. PSAPCA's decision not to prepare an EIS was clearly erroneous in view of the entire record as submitted and the public policy of SEPA. Norway Hill v. King County Council, supra at 278 (1976).

The failure to have an EIS where one is required renders the agency action illegal. Leschi v. Highway Comm'n, supra at 279-280. See Juanita Bay Valley Com. v. Kirkland, 9 Wn.App. 59, 73 (1973). Accordingly, PSAPCA's decision, in its Resolution No. 359, to grant a variance lasting up to five years should be reversed and the matter remanded to PSAPCA for further proceedings.

Having considered both motions, and being fully advised, the Pollution Control Hearings Board enters this

ORDER

1. Respondent ASARCO's Motion for Partial Summary Judgment is denied;

2. Appellants' Motion for Summary Judgment is granted; and

3. The variance is vacated and the matter is remanded to respondent Puget Sound Air Pollution Control Agency for further proceedings.

DATED this 30th day of March, 1977.

POLLUTION CONTROL HEARINGS BOARD

W. A. GISSBERG, Chairman

CHRIS SMITH, Member